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No. 95-5661 (2)

Supreme Court, U.S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JUAN MELENDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

WAN J. KIM
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether the district court had authority to sentence petitioner below the mandatory minimum sentence prescribed by the statute under which petitioner was convicted, when the government filed a motion under Sentencing Guidelines § 5K1.1 for a downward departure from the applicable Guidelines sentencing range, but refrained from filing a motion under 18 U.S.C. 3553(e) for a departure below the statutory minimum sentence.

(I)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 55 F.3d 130.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1995. A petition for rehearing was denied on June 27, 1995. The petition for writ of certiorari was filed on August 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the District of New Jersey to conspiring to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 846.

He was sentenced to the mandatory minimum sentence of 120 months' imprisonment prescribed for such violations by 21 U.S.C. 841(b)(1)(A) (1988 & Supp. V 1993), to be followed by five years' supervised release. The court of appeals affirmed. Pet. 1-15.

1. On June 23, 1993, petitioner pleaded guilty to conspiring to possess cocaine with the intent to distribute it. Gov't C.A. Br. 4. The plea stemmed from his role in attempting to purchase a large quantity of cocaine from confidential informants of the United States Customs Service. Pet. App. 2. Petitioner's plea agreement provided that the government would file a motion under Sentencing Guidelines § 5K1.1 for a downward departure from the sentence dictated by the Sentencing Guidelines if he produced substantial information about drug trafficking activities. *Id.* at 3.¹ In contrast, the government did not agree to file a separate motion under 18 U.S.C. 3553(e) for a departure below the ten-year mandatory minimum sentence prescribed by 21 U.S.C. 841(b)(1)(A).²

¹ Sentencing Guidelines § 5K1.1 provides in relevant part:

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

² 18 U.S.C. 3553(e) provides:

Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

Ibid. The plea agreement stipulated that the applicable range under Guidelines § 2D1.1(4) would be determined on the basis of 50 to 150 kilograms of cocaine. Gov't C.A. Br. 4. Coupled with an offense level of 33 and a criminal history category of I, the Presentence Report calculated a Guidelines range of 135 to 168 months' imprisonment. Pet. App. 3; Presentence Report ¶ 65.

Petitioner provided substantial assistance to the government, and, in accordance with the plea agreement, the government filed a motion under Guidelines § 5K1.1. Pet. App. 3. After granting the motion, the district court departed downward from the Guidelines range by sentencing petitioner to the statutory mandatory minimum sentence of 120 months' imprisonment. *Id.* at 4. The court held that, in the absence of a separate government motion under 18 U.S.C. 3553(e), it could not depart below the statutory minimum sentence. *Ibid.*

2. The court of appeals affirmed. Pet. App. 1-15. In relevant part, it held that "a motion under [Sentencing Guidelines] §5K1.1 unaccompanied by a motion under 18 U.S.C. § 3553(e) does not authorize a sentencing court to impose a sentence lower than a statutory minimum." Pet. App. 10.³ The court determined that Congress and the Sentencing Commission intended to give the prosecutor the discretion to allow a court to depart below the Guidelines range, without allowing it to depart below a lower statutory minimum sentence. *Id.* at 6-9.

³ Judge Huyett dissented from that holding. Pet. App. 13-15.

ARGUMENT

1. Petitioner contends (Pet. 8-11) that the district court had authority to depart below the mandatory minimum sentence prescribed by statute for the offense of which he was convicted, even though the government did not move for such a departure under 18 U.S.C. 3553(e). The court of appeals correctly rejected that contention. This Court has declined further review of the issue on numerous prior occasions. See United States v. Sanchez, 32 F.3d 1330 (8th Cir. 1994), cert. denied, 115 S. Ct. 1119 (1995); United States v. Womack, 985 F.2d 395, 399-400 (8th Cir.), cert. denied, 114 S. Ct. 276 (1993); United States v. Durham, 963 F.2d 185, 187 (8th Cir.), cert. denied, 113 S. Ct. 662 (1992); United States v. Rodriguez-Morales, 958 F.2d 1441, 1447 (8th Cir.), cert. denied, 113 S. Ct. 375 (1992). There is no reason for a different result here.

Section 5K1.1 provides that, "[u]pon motion of the government * * * the court may depart from the guidelines." (Emphasis added.) Section 5K1.1 does not refer to a departure from statutory mandatory minimum sentences. The commentary to Section 5K1.1, however, states that a departure below a mandatory minimum sentence may be justified "[u]nder circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n)." One of the circumstances set forth in 18 U.S.C. 3553(e) for a departure below the statutory minimum sentence is a motion by the government for such a departure. Consequently, where, as here, the government does not

file a motion to depart below the statutory minimum, the district court lacks authority to grant such a departure.

As the court of appeals recognized, Section 3553(e) of Title 18 and Section 5K1.1 of the Guidelines are distinct provisions that serve different purposes. See Pet. App. 5-8. The prosecutor may reasonably determine, based on an evaluation of the seriousness of the defendant's crime and the value of his cooperation, that the defendant's assistance warrants a motion under Section 5K1.1 for departure below the Guidelines range, but not a motion under 18 U.S.C. 3553(e) for a further reduction below the statutory minimum sentence. See Pet. App. 9. Petitioner does not provide any basis for reviewing that determination in this case. See generally Wade v. United States, 504 U.S. 181, 185-186 (1992) (prosecutor has broad discretion to decide whether to file a substantial assistance motion, subject only to constitutional limitations).

The Third Circuit's decision in this case accords with the Eighth Circuit's decision in United States v. Rodriguez-Morales, *supra*. See Pet. App. 10 n.2. As petitioner (Pet. 8-11 and 11 n.2) and the dissent below (Pet. App. 13) pointed out, however, those decisions conflict with decisions in four other circuits. See United States v. Wills, 35 F.3d 1192, 1194-1195 (7th Cir. 1994); United States v. Beckett, 996 F.2d 70, 75 (5th Cir. 1993); United States v. Cheng Ah-Kai, 951 F.2d 490, 492-493 (2d Cir. 1991); United States v. Keene, 933 F.2d 711, 712 (9th Cir. 1991). The latter courts have held that a motion by the government under

Guidelines § 5K1.1 authorizes a sentencing court to depart below both the Guidelines range and the statutory minimum sentence.

The conflict nevertheless does not merit review by the Court, because the Sentencing Commission has authority to promulgate guidelines that address the proper response by a court when the government moves for departure below an applicable sentence based on substantial assistance. See 28 U.S.C. 994(n) ("The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence * * *"); 18 U.S.C. 3553(e) ("a sentence below a level established by statute as minimum sentence * * * shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28"). Accordingly, because the Commission may resolve the issue on which the courts of appeals have disagreed, review by this Court is unnecessary. See Braxton v. United States, 500 U.S. 344, 348 (1991) (because Congress contemplated that Sentencing Commission would periodically "make whatever clarifying revisions of the Guidelines conflicting judicial decisions might suggest," this Court will be "more restrained and circumspect" in granting review to resolve such conflicts).⁴

⁴ Some decisions suggest that Congress did not intend to permit the government to limit a court's sentencing discretion, once the government files a motion for a departure based on substantial assistance. See Beckett, 996 F.2d at 75; Keene, 933 F.2d at 714; compare Wills, 35 F.2d at 1195-1196 (deferring to what the court understood to be the Commission's interpretation of the statute). The statute does not explicitly address that issue,

2. Petitioner also contends (Pet. 12-15) that the requirement that the government file a motion under 18 U.S.C. 3553(e) in order for the district court to impose a sentence below the statutory minimum violates the Due Process Clause and separation-of-powers principles. Those violations arise, according to petitioner, because "the prosecutor, rather than the judge, has the real discretion of deciding the scope of sentencing under a substantial assistance motion." Pet. 12. The result of a prosecutor's decision not to file a motion under Section 3553(e), however, is simply that the sentencing court must adhere to the mandatory minimum sentence that Congress prescribed. Accordingly, the lower courts have uniformly rejected the improper-delegation argument that petitioner asserts here and similar constitutional challenges.⁵ In Wade, the Court made clear that, "in both

however, and the Commission would thus have authority either (1) to require a motion under Section 3553(e) as a precondition to a departure from the applicable Guidelines sentencing range, or (2) to provide that departures from the statutory minimum and the Guidelines range require separate motions.

We also note that a provision in a bill introduced in the Senate would resolve the issue. See Section 735 of S.3, 104th Cong., 1st Sess. (1995), reprinted in 141 Cong. Rec. S90 (daily ed. Jan. 4, 1995) ("Section 994(n) of title 28, United States Code, is amended by adding the following at the end thereof: 'The power to reduce a sentence under this section authorizes a court to impose a sentence that is below a level established by statute as a minimum sentence only on motion of the government specifically seeking reduction below such level.'").

⁵ See United States v. Kuntz, 908 F.2d 655, 657-658 (10th Cir. 1990) (rejecting due process and separation-of-powers arguments, characterizing latter as "variant" of former); United States v. Huerta, 878 F.2d 89, 91-94 (2d Cir. 1989), cert. denied, 493 U.S. 1046 (1990) (due process and separation of powers); United States v. Ayarza, 874 F.2d 647, 653 (9th Cir. 1989) (same), cert. denied, 493 U.S. 1047 (1990); United States v. Musser, 856 F.2d

§ 3553(e) and § 5K1.1, the condition limiting the court's authority gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted." 504 U.S. at 185. If the decision whether to seek any reduction in the defendant's sentence based on his cooperation with the government may validly be committed to the prosecutor's discretion, the prosecutor may also exercise the narrower discretion to decide whether to request a sentence below the statutory minimum without exceeding the executive's permissible role in sentencing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

WAN J. KIM
Attorney

SEPTEMBER 1995

1484, 1487 (11th Cir. 1988) (separation of powers, equal protection, and due process), cert. denied, 489 U.S. 1022 (1989); see also United States v. Doe, 934 F.2d 353, 356-358 (D.C. Cir.) (due process), cert. denied, 502 U.S. 896 (1991); United States v. Harrison, 918 F.2d 30, 33 (5th Cir. 1990) (same); United States v. Levy, 904 F.2d 1026, 1035-1036 (6th Cir. 1990) (same), cert. denied, 498 U.S. 1091 (1991); United States v. LaGuardia, 902 F.2d 1010, 1013-1017 (1st Cir. 1990) (same); United States v. Lewis, 896 F.2d 246, 248-249 (7th Cir. 1990) (same); United States v. Francois, 889 F.2d 1341, 1343-1345 (4th Cir. 1989) (same), cert. denied, 494 U.S. 1085 (1990); United States v. Grant, 886 F.2d 1513, 1513-1514 (8th Cir. 1989) (due process).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MELENDEZ, JUAN
Petitioner

vs.

USA

No. 95-5661

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 20th day of September 1995.

PATRICK A. MULLIN
25 MAIN STREET
HACKENSACK, NJ 07601

Drew S. Days, III
DREW S. DAYS, III
Solicitor General

September 20, 1995

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